ST 99-10
Tax Type: Sales Tax
Issue: Situs For Imposition of Local (Sales) Tax

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE	)	Docket No. 98-ST-0000
OF THE STATE OF ILLINOIS	)	IBT No. 0000-0000
v.	)	NTL No. SF-9700000000000
"INFORMATION SERVICES	)	
DIVISION of PDQ, INC."	)	
	)	John E. White,
Taxpayer.	)	Administrative Law Judge

RECOMMENDATION FOR DISPOSITION

Appearances: Jeffrey Schiller appeared for taxpayer; Mark Dyckman appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when "Information Services Division of PDQ, Inc." ("PDQ") protested a Notice of Tax Liability the Illinois Department of Revenue ("Department") issued to it. Notice of Tax Liability ("NTL") no. SF-9700000000000 assessed Regional Transportation Authority Retailers' Occupation Tax ("RTA/ROT") and interest for the period beginning February 1994 through and including April 1995.

A hearing on a stipulated record was held at the Department's offices in Chicago. I have reviewed the parties' stipulated exhibits, as well as the memoranda they submitted, and I am including in this recommendation findings of fact and conclusions of law. I recommend that the tax assessed be finalized as issued.

Findings of Fact:

1. Following audit, the Department issued an NTL to "PDQ" that assessed RTA/ROT as measured by the gross receipts "PDQ" realized from selling

tangible personal property for use or consumption in Illinois, and not for resale. *See* Joint Stipulation ("Stip."), ¶ 1.

2. The NTL was issued on December 24, 1997, and assessed tax in the amount of $119,662, and interest in the amount of $33,887, calculated as of 1/23/98. ("Stip."), ¶ 1; Department Ex. 1 (correction of returns).[1] The NTL was issued following an audit of taxpayer's business regarding the period beginning February 1994 through and including April 1995. Stip. ¶ 1.

3. The tax was assessed after the Department determined that "PDQ" was engaged in the business of retailing in Cook County, Illinois. *See* Stip. ¶ 2; Department Ex. 1.

4. The issue of where "PDQ" was engaged in the business of retailing, or, as the parties put it, "the taxable locus of "PDQ's" sales activities", was litigated twice before within the Department's Office of Administrative Hearings. *See* Stip. ¶ 3.

5. The first time "PDQ" challenged the Department's determination that it was engaged in the business of retailing in Cook County, Illinois, involved an assessment of tax as measured by "PDQ's" gross receipts from sales during the month of October 1984. Stip. ¶ 8. A recommended decision, adopted by the Director in 1988, concluded that RTA/ROT should not be assessed. Stip. ¶ 8.

6. The second time taxpayer litigated the issue involved an assessment regarding "PDQ's" sales during the period from July 1984 through June 1987, excluding the month of October 1984. Stip. ¶ 10. In September 1991, the Director issued a final administrative decision in which he concluded, *inter alia*, that taxpayer was

[1] While the corrected return includes an assessment of penalty, the Department stated at hearing that it did not and would not assess a penalty in this matter. Tr. p. 10.

engaged in the business of retailing in Cook County, Illinois, and that RTA/ROT was properly assessed. *See id.* That Director's decision rejected the recommendation written by the administrative law judge who conducted the administrative hearing. Stip. ¶¶ 9-10; *see also* Final Administrative Decision, Department of Revenue v. "PDQ" Dealer Services, Inc., dated 9/24/91 (hereinafter, "1991 Director's decision").[2]

7. Taxpayer contested the 1991 Director's decision through administrative review in the Circuit Court of Sangamon County, which reversed that agency decision on January 18, 1994. Stip. ¶ 11.

8. The Department appealed, and on April 30, 1995, the Illinois appellate court, in a rule 23 order, reversed the circuit court, and reinstated the 1991 Director's decision that taxpayer was engaged in the business of retailing in Cook County, Illinois. Stip. ¶ 12.

9. As the parties' appeals of the 1991 Director's decision worked their way through the courts, the Department audited "PDQ" for the period of July 1987 through December 1992. Stip. ¶ 13. Although the Department initially assessed RTA/ROT against "PDQ" for that entire period, the Department, by agreement, revised that original assessment to eliminate the amount of RTA/ROT assessed regarding the months of April 1988 through September 1991. *Id.* That period reflected the time between the date the Department issued its 1988 administrative decision, and notified "PDQ" that it was not engaged in retailing in Cook County, and the date the 1991 Director's decision was issued, which notified "PDQ" that

[2] I take notice of the findings of fact and conclusions of law set forth in that 1991 Director's decision.

the Department had determined that it was engaged in retailing in Cook County. *Id*. The Department reduced that particular assessment "to reflect "PDQ's" reliance on the [Department's] prior [i.e., its 1988] administrative decision …." Stip. ¶ 13; *see also* 20 **ILCS** 2520/4.

10. After the Department agreed to reduce the assessment issued regarding the July 1987 through December 1992 audit period, "PDQ" paid assessments of RTA/ROT that were subsequently issued by the Department. Stip. ¶ 14. Specifically, "PDQ" paid assessments of RTA/ROT issued regarding the periods from January 1993 through January 1994, and from May 1995 through December 1995. *Id*.

11. All material facts regarding the "PDQ's" sales activities during the period from February 1994 through April 1995 are identical to those found in the 1991 Director's decision, as reviewed by the Illinois appellate court. Stip. ¶ 5.

Conclusions of Law:

The RTA/ROT is imposed on persons engaged in the business of selling tangible personal property at retail within the metropolitan region that consists of Cook, Dupage, Kane, Lake, McHenry and Will Counties. 70 **ILCS** 3615/4.03(e); Edward Don & Co. v. Zagel, 95 Ill.App.3d 589 (1st Dist. 1981); *see also* 70 **ILCS** 3615/1.02-1.03 (defining "metropolitan region"). Various sections of the Illinois Retailers' Occupation Tax Act ("ROTA"), including § 4, are incorporated by reference into the Regional Transportation Authority Act. 70 **ILCS** 3615/4.03(e). Section 4 of the ROTA provides, in part:

> As soon as practicable after any return is filed, the Department shall examine such return and shall, if necessary, correct such return according to its best judgment and information. … In the event that the return is

> corrected for any reason other than a mathematical error, any return so corrected by the Department shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax due, as shown therein.
>
> Proof of such correction by the Department may be made at any hearing before the Department or in any legal proceeding by a reproduced copy or computer print-out of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue.

35 **ILCS** 120/4. Therefore, the Department established the *prima facie* correctness of its determination that ROT/RTA was due in the amount set forth in the NTL when it introduced its correction of returns into evidence under the certificate of the Director. 70 **ILCS** 3615/4.03(e); 35 **ILCS** 120/4.

Once the DOR establishes its *prima facie* case, the burden shifts to the plaintiff to overcome it by producing competent evidence, identified with its books and records showing that the DOR's returns are incorrect. A.R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 832 (1st Dist. 1988). Even though "PDQ" paid RTA/ROT assessments issued for periods immediately before and immediately after the period at issue (Stip. ¶ 14), "PDQ" seeks relief from the amounts of RTA/ROT assessed regarding the months of February 1994 through and including April 1995, on the basis of equitable relief. Stip. ¶ 6. "PDQ" seeks that tax relief based on a reliance theory. Stip. ¶ 14. "PDQ" argues that the decisions in Rockford Life Insurance v. Department of Revenue, 128 Ill. App. 3d 302 (2d Dist. 1984) and Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427 (1966) support the imposition of equitable estoppel here.

In its memorandum of law, "PDQ" asserts that it relied to its detriment on the following acts of the Department:

- the Department's failure to seek a stay of the Sangamon County circuit court's

1/14/94 decision pending its appeal.

- the Department's failure to ask the Sangamon County circuit court "to force "PDQ" to collect the disputed taxes during the appeal period."

- the Department's agreement to reduce an assessment of tax against "PDQ", regarding the period from July 1987 through December 1992, so as to eliminate the amount of RTA/ROT assessed for the period of April 1988 through September 1991, to reflect "PDQ's" reliance on the 1988 administrative decision.

"PDQ's" Post-Hearing Memorandum (""PDQ's" Brief"), p. 2; Stip. ¶ 14.

As to the first two acts described by "PDQ", the Department's decision not to request a stay of the Sangamon County circuit court's January 1994 reversal of the Director's final administrative decision pursuant to Illinois Supreme Court Rule 305(h), and its decision not to ask the Sangamon County circuit court to force "PDQ" to start collecting the tax the court just decided "PDQ" did not owe, are not positive acts sufficient to support the doctrine of estoppel. Hickey v. Illinois Central Railroad Co., 35 Ill. 2d at 448-49. Even though the Illinois supreme court has held that estoppel may, in rare circumstances, be applied against the State, it has always adhered to the rule that the "mere non-action of governmental officers is not sufficient to work an estoppel and … before the doctrine can be invoked against the State or a municipality there must have been some positive acts which may have induced the action of the adverse party …." *Id.* (*quoting* City of Quincy v. Sturhahn, 18 Ill. 2d 604, 614 (1960)).

More specifically, with regard to the first alleged act, Illinois Supreme Court Rule 305(h) provides:

> (h) Appeals by Public Agencies. If an appeal is prosecuted by a public, municipal, governmental, or quasi-municipal corporation, or by a public officer in that person's official capacity for the benefit of the public, the trial court, or the reviewing court or a judge thereof, may stay the judgment

pending appeal without requiring that any bond be given.

Ill. Supreme Court Rule § 305(h). Under the express language of the rule, the Department is under no duty to request a stay when taking an appeal.

Nor does "PDQ" identify any rational reason why the Department might have requested a stay in that earlier matter. While "PDQ" may have paid a bond to proceed on administrative review following the 1991 Director's decision, the Sangamon County circuit court's judgment order did not require the Department to repay any amounts of RTA/ROT that "PDQ" might have previously paid to Illinois. That is because "PDQ" has agreed that the facts material to the 1991 Director's decision are identical to the facts here (Stip. ¶ 5), and, in this dispute, "PDQ" concedes that it never collected the RTA/ROT from its customers, or paid such amounts to the Department. "PDQ's" Brief, pp. 2-3.

Moreover, the Department's decision not to request a stay of the Sangamon County circuit court's 1994 order does not mean that "there is no reason for the state agency to ever seek a stay." *See* "PDQ's" Brief, p. 2. Situations more appropriate for the Department's request for a stay under § 305(h) would include, for example, where a circuit court's judgment order declared a statute unconstitutional, or where a court's order directed the Department to release and pay over monies previously paid pursuant to the provisions of the State Officers and Employees Money Disposition Act, 30 **ILCS** 230/1 *et seq.*

Even though "PDQ" concedes that it owed RTA/ROT from January 1993 through January 1994, and from May 1995 through December 1995 (*see* Stip. ¶ 14), "PDQ" next argues that the Department should be estopped from assessing and collecting the tax

regarding the period from February 1994 through April 1995 because the Department did not ask the Sangamon County circuit court to require "PDQ" to separately state and collect tax from its customers. "PDQ" argues that "right and justice do not favor imposing on "PDQ" the responsibility for paying a tax which it could not collect from its customers because of a court decision. Even more egregious would be the requirement that "PDQ" pay interest on money it never collected and never had the use of." "PDQ's" Brief, p. 3.

"PDQ's" argument attempts to characterize the circuit court's judgment order as one that decided that "PDQ" was not required to collect RTA/ROT from others, instead of as one that decided "PDQ's" underlying liability for the tax. That, however, is not the case. Contrary to "PDQ's" spin of the issue and order in that case, the Sangamon County court held that the Director's 1991 decision — that "PDQ" owed the tax — was against the manifest weight of the evidence; it never decided that "PDQ" could not, as a matter of law, collect RTA/ROT from customers if it were engaged in retailing in Cook County.

Under the Regional Transportation Authority Act ("RTA"), moreover, a retailer's collection of tax from its customers is a permitted act, and not one that is required. 70 **ILCS** 3615/4.03(e). The pertinent section of the RTA has always provided that:

> Persons subject to any tax imposed under the authority granted in this Section *may* reimburse themselves for their seller's tax liability hereunder by separately stating the tax as an additional charge, which charge may be stated in combination in a single amount with State taxes that sellers are required to collect under the Use Tax Act, under any bracket schedules the Department may prescribe.

70 **ILCS** 3615/4.03(e) (emphasis added). Thus, liability for RTA/ROT does not depend on whether the retailer collects the tax from others. Instead, liability depends on whether

a person is engaged in the business of retailing in the metropolitan region. 70 **ILCS** 3615/4.03(e); Edward Don & Company v. Zagel, 95 Ill. App. 3d 589 (1st Dist. 1981).

Here, "PDQ's" decision not to separately state and collect the RTA/ROT from its customers either before or after February 1994 does not mean that it was not engaged in the business of retailing in Cook County. "PDQ" concedes that it was, even during the period at issue. Stip. ¶ 5. Therefore, "PDQ's" cries of foul at the prospect of being assessed tax regarding sales for which they never collected a complementary amount from their customers (*see* "PDQ's" Brief, pp. 2-3), cannot be taken too seriously. Such a prospect has long been part of Illinois' retailers' occupation taxing scheme, which, it should be recalled, existed without a complementary use tax for decades. *See e.g.*, People's Drug Shop, Inc. v. Moysey, 384 Ill. 283, 287 (1943) ("Unambiguous provisions of the [ROTA] proclaim, and the decisions of this court uniformly hold, that the tax is upon retailers and not upon consumers, and that the sole duty of paying the tax rests upon the former."); Reif v. Barrett, 355 Ill. 104 (1933) (finding the ROTA constitutional); Turner v. Wright, 11 Ill. 2d 161 (1957) (finding the UTA constitutional). Illinois retailers are responsible for paying ROT (35 **ILCS** 120/2), and Illinois retailers engaged in the business of selling at retail within the metropolitan region are responsible for paying RTA/ROT. 70 **ILCS** 3615/4.03(e). Retailers owe those different taxes whether they choose to reimburse themselves or not. 35 **ILCS** 120/2; 70 **ILCS** 3615/4.03(e).

Additionally, the matter before the Sangamon County circuit court did not involve the Department's demand that "PDQ" pass on to its customers whatever amounts of RTA/ROT it owed. Rather, and just as it did in the instant matter, the Department corrected "PDQ's" returns and issued an assessment after determining that "PDQ" was

engaged in the business of retailing in Cook County, and after determining that it had not paid RTA/ROT on its monthly returns. *Compare* 1991 Director's decision, pp. 3-4 *with* Department Ex. 1 (correction of returns) *and* Stip. ¶¶ 1-2. In circuit court, the Department was merely defending its Director's 1991 conclusion that, since "PDQ" was engaged in the business of retailing in Cook County, it owed the tax imposed by the RTA/ROT.

"PDQ", however, argues that, after the Sangamon County circuit court decided that the 1991 Director's decision was against the manifest weight of the evidence, counsel for the Department somehow caused "PDQ" harm by not asking the same court to make "PDQ" collect the taxes the court had just decided "PDQ" didn't owe. That argument strains reason. After the Sangamon County circuit court issued its judgment order, the Department acted positively, and timely, by filing an appeal. I conclude that the Department's actions during the course of the Sangamon County circuit court review of the 1991 Director's decision do not warrant the application of estoppel against the Department. Hickey v. Illinois Central Railroad Co., 35 Ill. 2d at 448-49.

As to the Department's agreement to reduce an earlier assessment of RTA/ROT following its audit of "PDQ's" business from July 1987 through December 1992 (*see* Stip. ¶ 13), "PDQ" argues that the Department:

> found it appropriate for "PDQ" not to collect the additional taxes in reliance upon the first Director's decision, but now asserts that it was inappropriate to rely upon the Circuit Court's decision to the same effect. Thus, the DOR espouses the following position — you can rely on our administrative decision but not on the decision rendered by a state court."

"PDQ's" Brief, p. 2. In its brief, the Department responded that it agreed not to assess

tax against "PDQ" regarding the period from April 1988 through September 1991 (*see* Stip. ¶ 13) because such an assessment may have violated the Taxpayer's Bill of Rights Act. Department's Brief, p. 4. Section 4 of that act provides that the "Department of Revenue shall have the … dut[y] to … abate taxes and penalties assessed based upon erroneous written information or advice given by the Department." 20 **ILCS** 2520/4. When the Illinois General Assembly wrote the Taxpayer's Bill of Rights, it intended to provide protections to taxpayers who actually relied on erroneous written information or advice given to them by the Department. 20 **ILCS** 2520/2, 2520/4.

After considering the parties' stipulation of fact number 13, it is not accurate to say that the Department found it appropriate that "PDQ" should not collect RTA/ROT from its customers during the period beginning April 1988 through September 1991. Rather, it is more proper to conclude that the Department determined that it would not likely succeed if it attempted to make "PDQ" pay RTA/ROT regarding that particular period, because the Department had previously notified "PDQ", in writing, that it did not owe such taxes. *See* Stip. ¶¶ 8, 10, 13; 20 **ILCS** 2520/4. Nothing in the Taxpayer's Bill of Rights Act, however, addresses the situation here. In fact, "PDQ" acknowledges that it could not rely on the Department's 1988 administrative decision after it received the 1991 Director's decision. "PDQ's" Brief, p. 3.

In its Reply, "PDQ" focuses its reliance argument more pointedly on the actions of the circuit court of Sangamon County. Specifically, it argues that it had "a right to rely upon the acts taken by an independent body — the duly appointed Circuit Court of Sangamon County, Illinois." "PDQ's" Reply Brief, p. 2. However, estoppel is the equitable remedy invoked, as justice requires, "where a party by his statements or

conduct leads another to do something he would not have done but for the statements or conduct *of the other party*. The party claiming the estoppel must have relied on the acts or representations of the other and have had no knowledge or convenient means of knowing the true facts." Hickey v. Illinois Central Railroad Co., 35 Ill. 2d at 448 (emphasis added); *see also* Rockford, 128 Ill. App. 3d at 304. As the Department argued in its brief, there is simply no way that the circuit court's 1994 judgment order can be viewed as the statement or action of the Department.

Nor did any Department conduct or action keep "PDQ" from knowing the facts regarding its own business practices. The facts relevant to this case, like those relevant to the 1991 Director's decision (*see* Stip. ¶ 5), include the fact that "PDQ's" own written sales contracts provided that, "This agreement shall become effective upon being signed by an authorized officer of "PDQ". "PDQ's" marketing representatives do not have the authority to bind "PDQ"." 1991 Director's decision, p. 5 (finding of fact number 10). Based on the findings of fact detailed in the 1991 Director's decision, the Director concluded that:

> * * * As determined by the Court in *Edward Don & Company v. Zagel*, (1981), 95 Ill. App. 3d 589, 420 N.E. 2d 501, it is not the county where the sale takes place, but rather the county in which the occupation of selling occurs that governs the imposition of RTA/ROT.
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> * * * *
>
> In addition to the critical act of contract acceptance, sufficient activity and control of the operations of taxpayer occurs in its Schaumburg location to conclude that this taxpayer conducts its retail occupation in Cook County Illinois. Thus, the imposition of RTA/ROT based on the Cook County rate is both reasonable and supportable given the facts adduced at hearing.

1991 Director's decision, pp. 10-11.

"PDQ" was aware of the provisions it chose to use in its contracts during the

period at issue, and it was aware that its sales contracts were, in practice, not effective until after they were reviewed and signed by persons in its Cook County office. 1991 Director's decision, p. 5 (finding of fact number 10); Stip. ¶ 5. "PDQ", moreover, must be deemed to be aware that the Illinois appellate court — whose decisions, unlike those of Illinois' circuit courts, have binding, precedential effect — had repeatedly found the Department's regulations interpreting the RTA/ROT and similar local tax acts, reasonable and valid. Edward Don & Co. v. Zagel, 95 Ill. App. 3d 589 (1st Dist. 1981); Chemed Corp., Inc. v. Department of Revenue, 189 Ill. App. 3d 402 (4th Dist. 1989);[3] *see also* Cincinnati Insurance Co. v. Chapman, 181 Ill. 2d 65, 71 (1998) (a decision of an Illinois circuit court is "binding only on the parties thereto, as law of the case, and is not binding on the Supreme, Appellate, or Circuit Courts of Illinois.")

Finally, for estoppel to be invoked, a party must engage in conduct which reasonably caused another person to materially change his position to his detriment.

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[3] Since at least 1980, the rules the Department promulgated regarding the RTA/ROT provided, in pertinent part:

> Section 320.115Jurisdictional Questions
>
> * * * *
>
> b) Seller's Acceptance of Order
>
> 1) Without attempting to anticipate every kind of fact situation that may arise in this connection, *it is the Department's opinion, in general, that the seller's acceptance of the purchase order or other contracting action in the making of the sales contract is the most important single factor in the occupation of selling*. If the purchase order is accepted at the seller's place of business within the metropolitan region or … if a purchase order which is an acceptance of the seller's complete and unconditional offer to sell is received by the seller's place of business within the metropolitan region or by someone working out of such place of business, the seller incurs Regional Transportation Authority Retailers' Occupation Tax liability in the metropolitan region if the sale is at retail and the purchaser receives the physical possession of the property in Illinois.

86 Ill. Admin. Code § 320.115(b) (emphasis added); Chemed, 189 Ill. App. 3d at 409.

Phillips Products Co., Inc. v. Industrial Comm., 94 Ill. 2d 200 (1983). The conduct of the party seeking estoppel may be scrutinized to determine, *inter alia*, whether, in fact, he materially changed his position, or whether any such change was undertaken in reasonable reliance upon the conduct or statements of the other party. *See* Gary-Wheaton Bank v. Meyer, 130 Ill. App. 3d 87 (2d Dist. 1984).

Here, "PDQ" offered no evidence to establish that, prior to February 1994, it had been separately stating and collecting RTA/ROT regarding its sales, but then stopped because of some statement or conduct by the Department. *See* "PDQ's" Brief, pp. 2-3. "PDQ", moreover, had not separately stated and collected RTA/ROT from its customers during any of the earlier periods identified in the parties' stipulation. *See* Stip. ¶¶ 3, 8-9, 13-14; *see also* 1991 Director's decision, pp. 3-4. In sum, there is no evidence that "PDQ" ever changed its business practices at all. From the record, it appears that "PDQ" simply never collected or paid, on a monthly basis, the same tax that is imposed on all other similarly situated persons engaged in the business of retailing in Cook County. Therefore, "PDQ's" estoppel arguments must fail.

Conclusion:

"PDQ" conceded that it was subject to the RTA/ROT when it paid assessments issued for periods both before and after the period at issue. Stip. ¶ 14. The Sangamon County circuit court's 1/14/94 order denying the 1991 Director's decision, which "PDQ" knew the Department timely appealed (*see* Stip. ¶¶ 5-12), did not provide "PDQ" with a reasonable basis to believe that it did not owe RTA/ROT during the period from February 1994 through April 1995, when that order was reversed by the Illinois appellate court. Since "PDQ" offered no evidence to show that it materially changed its position in

reasonable reliance upon any act or statement by the Department, "PDQ" has not established that the Department should be estopped from assessing and collecting the tax at issue. Hickey v. Illinois Central Railroad Co., 35 Ill. 2d at 448-49.

I recommend that the NTL be finalized as issued, with interest to accrue pursuant to statute.

8/18/99
Date

Administrative Law Judge